

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RAHMAN STEVE MORRIS**  
Claimant

VS.

**CREEKSTONE FARMS PREMIUM BEEF**  
Respondent

AND

**LIBERTY INSURANCE CORP.**  
Insurance Carrier

Docket No. **1,053,851**

**ORDER**

Respondent and its insurance carrier request review of the June 24, 2011, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

**ISSUES**

The authorized treating physician for claimant's work-related back injury noted the reason claimant had not recovered from his back pain was probably due to his morbid obesity. The authorized treating physician then released claimant from his care but recommended claimant be referred for consideration for gastric bypass surgery as the procedure might help his back pain and allow him to return to gainful employment. Respondent denied the referral but claimant obtained the surgical consult on his own. The matter then proceeded to a preliminary hearing where claimant sought additional medical treatment consisting of the gastric bypass surgery.

The Administrative Law Judge (ALJ) concluded the proposed gastric bypass surgery was reasonable and necessary medical treatment to cure or relieve the effects of claimant's low back pain due to his work-related injury.

Respondent requests review and argues the ALJ exceeded her jurisdiction in finding that the medical treatment, gastric bypass surgery, is reasonable and necessary medical treatment for claimant's work-related back injury. Respondent argues that claimant's morbid obesity preexisted his claimed work-related injury and therefore the proposed gastric bypass surgery is not causally related to the back injury. Respondent further argues claimant has failed to sustain his burden of proof to establish the proposed gastric bypass surgery will provide relief for claimant's low back pain.

Claimant argues the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On November 24, 2010, claimant was injured at work. His job duty was inspecting meat in boxes and making sure the meat was in the proper box. Occasionally, claimant would have to pull a box and place a new tag on the box. At the time of claimant's accident he had worked for respondent about four months. Claimant testified:

Q. What happened on November 24, 2010 that resulted in this injury to your back?

A. They had -- they have two lines at the station that I was standing at. One of them had went down and all the boxes were coming to my line. And 90 percent of them were wrong, so I had to throw off every box that was coming to me. And they averaged from 36 to 100 pounds. And I did that for about two hours before they got the other line fixed.<sup>1</sup>

Claimant received medical treatment from Ark City clinic. He continued to work but was placed in a different job which required him to take the temperatures of meat. He then started working in the office and worked until December 6, 2010.

Respondent referred claimant to Dr. Anthony Pollock. The doctor ordered some tests and physical therapy. Claimant completed the physical therapy with Ark Valley Physical Therapy. Dr. Pollock then referred claimant to a gastric bypass surgeon, Dr. Jeremy Howes. Dr. Pollock, on April 6, 2011, had referred claimant to Solutions for Life and the prescription indicated the referral was due to claimant's obesity and not for his work-related back injury.

Claimant testified that the reason he was referred to a gastric bypass surgeon was due to his weight not allowing his back to heal from the injury.

Q. And what was the reason Dr. Pollock gave you for that?

A. He said by the way it looked on my back injury the only other thing that we could do is talk to the surgeon about this weight-loss surgery, gastric bypass surgery. Because of my weight it wasn't letting my injury heal.

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<sup>1</sup> P.H. Trans. at 12-13.

Q. And so you are asking the Court to approve that particular procedure that Dr. Pollock referred you to including whatever Dr. Howes has recommended, I guess. Is that a fair statement?

A. Yes, sir.

Q. Other than -- what is your hope that that gastric bypass procedure would do in terms of -- given this issue of losing weight? Has Dr. Pollock talked to you about getting greater functionality, reducing your restrictions?

A. Yes, he said it will take the strain and -- it will take the strain away because I can't carry the same weight and get rid of the pain.<sup>2</sup>

Dr. Pollock noted that claimant's chronic lower back pain did not respond to physical therapy. And that claimant might not get over the low back strain because of his weight. In a May 17, 2011, letter to claimant's attorney, Dr. Pollock noted in pertinent part:

It may well be that he will not be able to get over his chronic back strain because of his weight. As you know, I have had several discussions with him regarding the possibility of some weight loss surgery. I have suggested he make an appointment with one of the two bariatric surgeons to get their opinion in this regard, but he has yet to do so. If they feel he is a candidate for surgery and he wishes to proceed, this may help his back pain and allow him to return to gainful employment.<sup>3</sup>

Dr. Pollock released claimant from his care in May 2011.

Dr. Howes examined claimant on May 23, 2011, and noted claimant had morbid obesity and back pain. The doctor further noted claimant met the criteria for gastric bypass surgery. Dr. Howes opined that once claimant loses the weight it will help his back pain as well as prevention of any other obesity related comorbidities. And Dr. Howes noted that he agreed with Dr. Pollock's assessment that claimant's obesity is having some play with claimant's inability to improve his symptoms from his chronic back pain.

Claimant testified that at the time of his injury he weighed between 300-320 pounds which he had been for years. But claimant further testified that he had never had any limitations against lifting, twisting, bending or turning before the injury to his back on November 24, 2010.

Respondent argues that because claimant's obesity preexisted his work-related injury, the need for a gastric bypass is not directly attributable to the injuries he suffered in connection with this claim. K.S.A. 2010 Supp. 44-510h(a) requires that employers

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<sup>2</sup> P.H. Trans. at 16-17.

<sup>3</sup> *Id.*, Cl. Ex. 3.

provide such medical treatment as is “reasonably necessary to cure and relieve the employee from the effects of the injury.”

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director’s discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.<sup>4</sup>

Obviously, the context in which the services are provided is significant to any determination of what constitutes medical treatment. The Kansas Court of Appeals has held that what may not constitute medical treatment in one context, may in another. In *Hedrick v. U.S.D. No. 259*,<sup>5</sup> the Court of Appeals held that a personal motor vehicle was not medical treatment in the context of that claim, but expressly noted that if claimant’s injury had resulted in paraplegia its holding might have been different.

Claimant is and has been overweight for some time. He was overweight before his accident at work. The gastric bypass surgery will benefit his weight problem. However, it will also benefit his work-related back injury. Dr. Pollock indicated that the gastric bypass surgery might help claimant’s back pain and allow him to return to gainful employment. Dr. Howes agreed that weight loss would help claimant’s back pain improve and it appears that Dr. Howes’ primary reason for recommending the surgery is to treat claimant’s back pain. The undersigned Board Member finds that the gastric bypass surgery is reasonable and necessary medical treatment to cure or relieve the effects of claimant’s work injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>6</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>7</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 24, 2011, is affirmed.

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<sup>4</sup> K.S.A. 2010 Supp. 44-510h(a).

<sup>5</sup> *Hedrick v. U.S.D. No. 259*, 23 Kan. App. 2d 783, 935 P.2d 1083 (1997).

<sup>6</sup> K.S.A. 44-534a.

<sup>7</sup> K.S.A. 2010 Supp. 44-555c(k).

**IT IS SO ORDERED.**

Dated this 31st day of August, 2011.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge